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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

SURGICAL INSTRUMENT SERVICE COMPANY, INC. *Plaintiff/Counter-Defendant,* v. INTUITIVE SURGICAL, INC. *Defendant/Counterclaimant.*	CASE NO. 3:21-CV-03496-AMO Honorable Araceli Martínez-Olguín **PLAINTIFF SIS's RESPONSE TO DEFENDANT INTUITIVES' ADDENDUM REGARDING SIS'S MOTIONS IN LIMINE NOS. 1 AND 5 AND INTUITIVE'S MOTION IN LIMINE NO. 4**

There is no dispute that the type of services offered by SIS have never been "approved" by Intuitive. *E.g.*, Dkt. 321 at 36:14-37:16. Intuitive's **stated** and **demonstrated** desire in making the March 2023 statement was to force third parties to obtain costly and unnecessary 510(k) clearances. *See id.* at 39:9-11 ("And then we said: **If somebody gets FDA clearance, that's good enough for us**." (emphasis added)); Dkt. 245-1 at 4:16-5:6. Intuitive's newly-cited franchisee cases are inapposite, at least because the contracts had clear approval processes. *Betaseed, Inc.* v. *U & I Inc.*, 681 F.2d 1203, 1224 (9th Cir. 1982); *Photovest Corp. v. Fotomat Corp.,* 606 F.2d 704, 722 (7th Cir. 1979). Intuitive's contract provides no mechanism for obtaining its approval for the repair of EndoWrists and its litigation-inspired "option" for authorized repair as of March, 2023, is illusory.[1] *See Mozart Co. v. Mercedes-Benz of N.A., Inc.*, 593 F. Supp. 1506, 1517 (N.D. Cal. 1984); *U.S. v. Mercedes-Benz of N.A., Inc.*, 517 F. Supp. 1369, 1382-83 (N.D. Cal. 1981). Intuitive still does not provide any approval path for third-party EndoWrist repair of the type performed by SIS.

SIS does not dispute the unremarkable need for "proof that damages were caused by illegal acts[.]" *City of Vernon* v. *S. Cal. Edison Co.*, 955 F.2d 1361, 1372 (9th Cir. 1992).[2] Here, SIS has not "fail[ed] to compete" but rather has been absolutely barred from competing. Intuitive's "announcement" is a ligation-concocted continuation of its illegal conduct, and unsupported by FDA. *Cf.,* Dkt. 204 at 13:2-4. Intuitive still has not explained how its website "announcement" overrides contrary contract terms. *Compare* Dkt. 228 at 10:1-11:12:2 *with* Dkt. 230-50 at 10:6-13; *and* Dkt. 245-1 *with* Dkt. 249-1. Nor has it explained how a single FDA-approved remanufactured Si EndoWrist is relevant to competition in a fair and open EndoWrist repair market.[3] *Compare* Dkt. 245-1 *with*; Dkt. 249-1 at p. 7 n.6; *and* Dkt. 321 at 37:21-38:2 *with id.* at 38:19-40:19.

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[1] *See* Decl. of David Rosa. Dkt. 137-2 at ¶ 46 ("any means ***not*** cleared by FDA [is] unlawful").
[2] *City of Vernon* does not discuss the "but for" world, and the ABA article supports SIS.
[3] Rather, Intuitive's stated purpose is to present a prejudicial FDA sideshow. Dkt. 231 at 40:6-11 (seeking to present "28-page" FDA letter to jury); *id.* at 41:22-25 ([T]hey're going to be claiming to the jury we had no basis for worrying about patient safety. . . And, respectfully, we did have a basis for that because our product had FDA clearance") *id.* at 44:3-6 ("when we said, 'Iconocare, you can sell it,' it shows that we are being motivated by patient safety").

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